In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-628

JAMES G. MOORE AND JUDSON E. TOMLIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet App. A1-A8) is reported at 465 F. 2d 514. No opinion was rendered by the district court.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1972. Petitioners' petition for rehearing and for rehearing *en banc* was denied on September 5, 1972. The petition for a writ of certiorari was filed on October 24, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals applied correct legal principles and the proper standard of review in determining that (contrary to the jury's verdict) petitioners were "responsible" officers, liable for the penalty to pay over withholding and Social Security taxes, within the meaning of Sections 6671 and 6672 of the Internal Revenue Code of 1954.

STATUTES INVOLVED

The pertinent provisions of Sections 3102, 3402, 6671, 6672 and 7501 of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth in the Appendix, *infra*, pp. 7-8.

STATEMENT

Petitioners, along with H. B. Branch, were the officers, shareholders and directors of Jetco Manufacturing Company during the years in issue. (Pet App. A4.) In 1968, as a result of Jetco's failure to pay its employees' Social Security and withholding taxes over to the government for the second and third quarters of 1966, the Internal Revenue Service made penalty assessments against petitioners under Section 6672 of the Code. Petitioners paid a portion of the taxes and filed a suit for refund (Pet. App. A1-A2), after which the government counterclaimed for the balance due. At trial, the undisputed evidence indicated that each of the petitioners was empowered to sign checks singly on Jetco's accounts. Furthermore, with the specific knowledge that the withheld taxes were not being paid over to the government, both petitioners continued to sign company checks for the payment of payroll (including their own gross salaries) and creditors in amounts

substantially in excess of the taxes due the Government. (Pet. App. A4-A6.) Other undisputed evidence showed that the employees' withheld taxes form submitted (without payment) for the second quarter of 1966 bore the signature of petitioner Moore as president of Jetco, and that a mortgage on certain Jetco property which was given to secure payroll advances was signed by Moore as president of Jetco "with full authority." Both petitioners had authority to hire and fire employees and both testified that there was never any formal delineation of duties at Jetco between the three officers. (Pet. App. A6.)

Petitioner Moore testified that Branch, who had died prior to trial, made all the decisions with respect to the payment of bills, and that he merely followed Branch's orders in signing his name to corporate checks. (Pet. App. A6.) Petitioners also introduced the testimony of a number of independent third-party witnesses (Jetco's bookkeeper (R. 125-126),[1] an independent outside accountant who performed accounting services for Jetco (R. 169) and two officers of banks where Jetco did business (R. 145, 149-150)) who testified that in their financial dealings involving Jetco they ordinarily dealt with Branch. The district court found as a matter of law that petitioners' failure to remit the taxes was willful (Pet. App. A3) but allowed the question whether either petitioner, or both, was a responsible officer to go to the jury. The jury found that neither petitioner was a responsible officer. On the basis of the

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[1] "R." references are to the separately bound record appendix prepared for use in the court of appeals.

uncontradicted evidence (Pet. App. A3), the court of appeals reversed the judgment entered on the jury's verdict.

ARGUMENT

The decision below is correct. There is no conflict or other reason for further review.

1. Section 6672 of the Internal Revenue Code (Appendix, *infra*) provides that any person required to withhold and pay over employees' income and social security taxes, who willfully fails to do so, is liable for a penalty equal to the amount of the delinquency with respect to such taxes. In general, those "high corporate officials charged with general control over corporate business affairs who participate in decisions concerning payment of creditors and disbursal of funds" are responsible officers under Section 6672. *Monday* v. *United States*, 421 F. 2d 1210, 1214-1215 (C.A. 7). See also *McCarty* v. *United States*, 437 F. 2d 961 (Ct. Cl.); *Newsome* v. *United States*, 431 F. 2d 742 (C.A. 5); *Gefen* v. *United States*, 400 F. 2d 476 (C.A. 5). The statute does not require that exclusive control over all corporate affairs be vested in only one official; there may be more than one "responsible officer." *Monday* v. *United States, supra; McCarty* v. *United States, supra; United States* v. *Hill*, 368 F. 2d 617 (C.A. 5); *Scott* v. *United States*, 354 F. 2d 292 (Ct. Cl.). Furthermore, an officer who has this broad responsibility over corporate affairs may not be absolved of liability merely because he has failed to exercise his authority. *Kelly* v. *Lethert*, 362 F. 2d 629 (C.A. 8). In the present case, the evidence adduced at trial indicated that both

petitioners were officers of Jetco, who were empowered to sign checks singly on the company's accounts. Moreover, they admittedly exercised this authority, in favor of other creditors, with full knowledge that the taxes due the Government were not being paid. Based on this uncontraverted evidence, the court of appeals correctly determined that, contrary to the jury's verdict, petitioners were, as a matter of law, "responsible" officers of Jetco. *Scott* v. *United States, supra; Newsome* v. *United States, supra.*

Petitioners contend (Pet. 5) that the court of appeals ignored certain other evidence which, standing alone, was sufficient to support the jury's verdict. They cite the testimony of independent third parties (*i.e.*, Jetco's bookkeeper, an outside accountant, and two bank officers) as having established that Branch was a Jetco officer with full authority over the expenditure of corporate funds. This testimony, however, in no way contradicts or diminishes from the undisputed evidence that petitioners also possessed the requisite authority, and consequently, that they were also "responsible" officers within the meaning of the statute.

2. There is no conflict between the standard of review employed by the court in this case and that sanctioned by the Court in *Lavender* v. *Kurn*, 327 U.S. 645. As we have pointed out, the court of appeals did not weigh conflicting evidence in overturning the jury verdict (and thus, it did not engage in the practice specifically disapproved in *Lavender*); instead it relied upon uncontradicted evidence, which, by itself, as a matter of law, necessitated a finding that petitioners were responsible officers. Nor is there a conflict between this case

and the Fifth Circuit's decision in *McCullough* v. *United States*, No. 72-1104, decided July 14, 1972 (Pet. App. A13-A16). The record in *McCullough* did not contain uncontested evidence such as that present in this case showing petitioners' broad corporate authority and their tendency to exercise that authority in favor of other creditors during the periods in issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1972.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 3102. DEDUCTION OF TAX FROM WAGES.

(a) *Requirement.*—The tax imposed by section 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. * * *

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SEC. 3402. [as amended by Sec. 101(a), Tax Adjustment Act of 1966, P.L. 89-368, 80 Stat. 38]. INCOME TAX COLLECTED AT SOURCE.

(a) *Requirement of withholding.*—Every employer making payment of wages shall deduct and withhold upon such wages (except as otherwise provided in this section) a tax determined in accordance with the following tables. For purposes of applying such tables, the term "the amount of wages" means the amount by which the wages exceed the number of withholding exemptions claimed, multiplied by the amount of one such exemption as shown in the table in subsection (b)(1):

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SEC. 6671. RULES FOR APPLICATION OF ASSESSABLE PENALTIES.

(a) *Penalty assessed as tax.*—The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary or his delegate, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

(b) *Person Defined.*—The term "person", as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership,

who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

SEC. 6672. FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO EVADE OR DEFEAT TAX.

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

SEC. 7501. LIABILITY FOR TAXES WITHHELD OR COLLECTED.

(a) *General rule.*—Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.

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